

INTERNATIONAL DEVELOPMENTS OF THE ISSUE OF TRAFFICKING IN HUMAN BEINGS AND THE UNITED NATIONS

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Abstract

The development of the legal regulation of trafficking in human beings under the auspices of United Nations has its origin in the efforts done by the league of nation. After the demise of the League of Nations the United Nations continued the efforts to best regulate the issue of trafficking in human beings, shifting the approach from undefined to human rights approach. This efforts culminated in 2001 with the Convention against Transnational Organized Crime and the its supplementing Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The Convention and the Protocol synthesised all previous efforts and on international level and bring a comprehensive and human rights based legal instrument for fight against trafficking in human beings.

I. Introduction

To explain how trafficking in women is being addressed today, it's useful to identify the three most commonly used approaches to trafficking in women: the organized crime approach, the migration approach and the human rights approach; the emphasis will be on the human rights approach. These approaches identify the practice of trafficking and generate strategies to fight it.

In order to show the development of the human rights approach, a historical survey of the international efforts to regulate trafficking in women and their connection to the human rights approach, from the first international instruments to fight trafficking in women to the last most recent international instrument to fight trafficking the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the Convention against Transnational Organized Crime.

This analysis of the historical developments in international law regulating trafficking in women also will confirm the numerous ambiguities, preconceptions, and barriers in connection to the issues of sexual exploitation, prostitution, and consent and coercion-all of which have created problems in the delimitation of the concept of trafficking. Nevertheless, despite their shortcomings, the international

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instruments were designed to impose legal obligations upon governments and push them to take action to combat trafficking.

II. League of Nations

After the political ‘death’ of the League of Nations, its work on the issue of trafficking in women was continued by its successor the United Nations, which, in December 1949, unified previous treaties into one treaty-the *Convention for Suppression of the Traffic in Person and of the Exploitation of the Prostitution of Others*.¹ The Convention in its preamble condemns:

‘...Prostitution and the accompanying evil of the traffic in person for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community...’²

For the first time, this Convention put forced prostitution into an international perspective whereas the previous Conventions, had limited it to a problem belonging within the borders of the domestic jurisdiction. It called for abolishing brothels and prostitution, adopting the prohibitionist approach. However, it did not prohibit prostitution *per se*;³ rather it introduced the criminalization of clients. Nevertheless, despite the good intentions of the drafters of the convention to criminalize procurers involved in the practice and to leave the prostitutes out of the process of criminalization, in practice the results were questionable at national level. Countries displayed a lack of will to deal with the issue in a proper way. For example, in India, the Immoral Traffic (Prevention) Act, which does not make prostitution illegal but targets solicitation, enticement, procuring, living off the earnings of prostitution, and keeping a brothel, has been invoked mostly against prostitutes.⁴

The Convention connected prostitution and the accompanying evil of the traffic in persons for the purpose of forced prostitution with the dignity and worth of

¹ 96 UNTS, 271, *Convention for the Suppression of the Traffic in Person and of the Exploitation of the Prostitution of Others* available on: www1.umn.edu/humanrts/instreetraffickingperson.htm.

² The Preamble, *ibid*.

³ Stephanie Farrior, *The International Law on Trafficking in Women and Children for prostitution: Making it Live Up to its Potential*, 10 Harvard Human Rights Journal 213-256, p 217.

⁴ See the Report of the Special Rapporteur on violence against women on trafficking in women, women’s migration and violence against women, submitted in to the UN Commission on Human rights, E/CN.4/2000/68, 29 February 2000, para. 25, pg. 12.

the human person⁵ and with specific individual human rights. Unfortunately, this initial progressive move was on a declaratory basis only and limited to the preamble of the treaty. The main text did not uphold any of its noble rhetoric. Even so the very presence of such language caused a number of States, not to accede to this Convention.⁶ The main reason for their abstention was that many governments permitted highly regulated forms of prostitution and were not willing to sign a treaty that required its elimination.⁷ According to the Special Rapporteur on Violence against Women, Women's Migration, and Trafficking in Women, the Convention, apart from its strong declaratory words, in practice does not embody the human rights approach:

‘The Convention does not take the human rights approach. It does not regard women as independent actors endowed with rights and reason; rather the Convention views them as vulnerable beings in need of protection from the evils of prostitution. As such, the 1949 Convention does very little to protect women from and provide remedies for the human rights violations committed in the course of trafficking, thereby increasing trafficked women's marginalisation and vulnerability to human rights violations.’⁸

Moreover the Convention has other shortcomings. It fails to define trafficking and it focuses only on trafficking for the purposes of prostitution. Article 1 stipulates that the states parties are obliged to punish any person who to gratify the passions of another:

Article 1:

⁵ According to Susan Jeanne Toepfer and Bryan Stuart Wells in *The World Wide Market for Sex: A Review of International and regional Legal Prohibitions Regarding Trafficking in Women*, Michigan Journal of Gender & Law 83, 1994: ‘The Convention framers also recognized the link between the illegal international trafficking in women and the legal market for women's bodies, centred around houses of prostitution..’ Curiously enough, the authors have used the expression: ‘the illegal international traffic in women as there was a legal international traffic in women. As seen from the previous text the traffic in women on international level was illegal since the 1904 Convention, where as internal trafficking become illegal somewhat later.’

⁶ 66 out of 160 of the UN member states ratified the 1949 Convention. See Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 Harvard Human Rights Journal, Volume 11 (1998), p. 75.

⁷ Marjan Wijers, Lin lap Chew, *Trafficking in Women Forced Labor and Slavery like Practices in Marriage Domestic Labor and Prostitution*, 1999, pg. 26.

⁸ The Report of the Special Rapporteur on violence against women on trafficking in women, women's migration and violence against women, submitted in to the UN Commission on Human rights, E/CN.4/2000/68, 29 February 2000.

- (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
- (2) Exploits the prostitution of another person, even with the consent of that person;

Article 2:

The Parties to the present convention further agree to punish any person who:

- (1) Keeps or manages, or knowingly finances or takes part in the financing of a brothel;
- (2) Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others;⁹

Nevertheless, the importance of this Convention ought not to be underestimated-a point stressed in *the Study on Traffic in Persons and Prostitution* (United Nations Department of Economic and Social Affairs, 1959):

‘In the first place, the act of procuring, enticing or leading away another person for purposes of prostitution are declared punishable offences whether or not there is transportation of the victim from one county to another. Thus, the convention not only provides for the suppression of the international traffic, but also extends its coverage to include the national traffic as well. Secondly, the traffic in person and the exploitation of the prostitution of others are declared punishable offences irrespective of the race, sex and age of victims...’¹⁰

It should be acknowledged that regardless of the theoretical importance of the Convention, it was not successful in its practical implementation. This was due, *inter alia*, to the weak enforcement mechanisms provided by the Convention, (as the case with the previous one); the lack of provisions offering sufficient protection of the rights of women victims of trafficking; and the failure to identify the socio-economic causes of trafficking for prostitution.¹¹ In other words, it did not delimit strategies *vis-à-vis* prevention, prosecution, and protection and assistance of the victims of trafficking.

⁹ Article 1 & 2. Convention for the Suppression of the Traffic in Person and of the Exploitation of the Prostitution of Others. Entry into force 25 July 1951, OHCHR.

¹⁰ UN Department of Economic and Social Affairs, *Study on traffic in persons and Prostitution*, New York: UN Publication No. 59.IV. 5; 1959.

¹¹ Stephanie Farrior, *The International Law on Trafficking in Women and Children for prostitution: Making it Live Up to its Potential*, 10 Harvard Human Rights Journal 213-256, p 217.

After this enhanced interest in regulating the traffic in women in the 1949 Convention on an international level, there was a gap in international development of the issue until 1967, when the trend of connecting the trafficking problem with exploitation of prostitution continued with the United Nation's Declaration on the Elimination of Discrimination against Women.¹² The Declaration limits the issue of trafficking to Article 8,¹³ which mentions only that:

‘All appropriate measures, including legislation, shall be taken to combat all forms of traffic in women and exploitation of prostitution of women.’

In 1979, the subsequent Convention for the Elimination of all forms of Discrimination of Women¹⁴ addressed the issue of trafficking in women as well. Even though this pivotal Convention for the affirmation and implementation of women's human rights¹⁵ sets out to assure respect for the human rights of women through elimination of all forms of discrimination against them, it only recognized trafficking of women as a product of the ongoing discrimination against women.¹⁶ It was silent on the violation of human rights suffered by women in the process and aftermath of trafficking *per se*. Even though the CEDAW Convention did not define trafficking nor the concept of exploitation of prostitution, it is very significant that they included trafficking in women explicitly. In its Article 6,¹⁷ it obliged state parties to the Convention to:

‘...take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.’

¹² Declaration on the Elimination of Discrimination against Women, Proclaimed by General Assembly Resolution 2263 of 7 November 1967, Office the High Commissioner of Human Rights.

¹³ Article 8, Declaration on the Elimination of Discrimination against Women, Proclaimed by General Assembly Resolution 2263 of 7 November 1967, Office the High Commissioner of Human Rights.

¹⁴ Convention on the Elimination of All Forms of Discrimination against Women entered into force 3 September 1981, Office of the High Commissioner for Human Rights, <http://193.194.138.190/html/menu3/b/1cedaw.htm>, visited: 12.07.2004.

¹⁵ Sheila Dauer, *Indivisible or Invisible, Women's Human Rights in Public and Private Sphere*, in Women, Gender, and Human Rights A Global Perspective, edited by Marjorie Agosin, 65-82, pg. 67, 2001.

¹⁶ Sheila Dauer, *Indivisible or Invisible, Women's Human Rights in Public and Private Sphere*, in Women, Gender, and Human Rights A Global Perspective, edited by Marjorie Agosin, 65-82, pg. 67, 2001.

¹⁷ Article 6, Convention on the Elimination of All Forms of Discrimination against Women entered into force 3 September 1981, Office of the High Commissioner for Human Rights, <http://193.194.138.190/html/menu3/b/1cedaw.htm>, visited: 12.07.2004.

What exactly appropriate measures the Convention had in mind in connection to trafficking in women, is not all that clear. The interpretation relies on the more general obligations to eliminate any form of existing discrimination against women (Article 2)¹⁸ stemming from the Convention.¹⁹ Bearing in mind that trafficking in women is a product of the cultural, historical and sociological connotations of the female's inferiority and objectification, it has been suggested that Article 6 of the Convention should be read with Article 5 that urges states to take all appropriate measures:²⁰

‘to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.’²¹

In General Recommendation 19, the Committee against Discrimination of Women has stated that ‘*specific preventive and punitive measures are necessary to overcome trafficking and sexual exploitation*’.²²

The measures that aim at changing social and cultural patterns, from the basis for the creation of prevention strategies to fight trafficking in women.

¹⁸ CEDAW found on: <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article2>
Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

¹⁹ Stefanie Farrior, *The International Law on Trafficking in Women and Children for Prostitution: Making it Live up to its Potential*, 10 Harvard Human Rights Journal 1997, 219.

²⁰ Ibid.

²¹ Article 5, Convention on the Elimination of All Forms of Discrimination against Women entered into force 3 September 1981, Office of the High Commissioner for Human Rights, <http://193.194.138.190/html/menu3/b/1cedaw.htm>, visited: 12.07.2004.

²² CEDAW, General Recommendation 19, UN GAOR, 1992, Doc. No. A/47/38.

On a negative note, however, the Convention did not explicitly call for eradicating of prostitution as such. This can be seen from its *travaux préparatoires* when Morocco's proposal for the abolition of prostitution in all its forms was rejected.²³

As in the 1980's, trafficking of women has continued to increase. Factors influencing the dramatic qualitative and quantitative change²⁴ of the traffic of women for the purposes of sexual exploitation were globalization, the end of the Cold War, and the liberalization of the socialist states. This trend continued in the 1990's when socialist countries underwent reforms in the process of transitioning from a socialist to a capitalist system.²⁵ These changes created a shift in the world capital, a demand for cheap labor, and mass migrations of people who, faced with the growing scarcity of resources in their home countries, went off to look for better life.²⁶ That influenced the United Nations once again and the European Community, for the first time to put the issue on their respective agendas.

In 1982, on the request of the United Nations Economic and Social Council, a Special Rapporteur on the Suppression of Trafficking in Persons and the Exploitation of Prostitution of Others was appointed.²⁷ In 1985, the Rapporteur in his report defined trafficking in persons as '*the exploitation of prostitution of women and children*' and labeled it as a human rights violation.²⁸

²³The Report of the Special Rapporteur on violence against women on trafficking in women, women's migration and violence against women, submitted in to the UN Commission on Human rights, E/CN.4/2000/68, 29 February 2000, para.28, available at the website of the United Nations High Commissioner for Human Rights at:<http://www.unhcr.ch/html/menu2/7/b/mwom.htm>.

²⁴According to Marjan Wijers, Lin Lap Chew in Trafficking in Women Forced Labor and Slavery like Practices in Marriage Domestic Labor and Prostitution, 1999, pg. 26, some of the reasons for the resurfacing of trafficking on the political agenda are strength of women's movements and the feminist concern with questions of female exploitation and/or global concern with the spread of AIDS.

²⁵ In the 1970s and 1980s there was rise in news reports about women trafficked and forced into prostitution in some Asian countries. The effect of the increasing globalization and thus increasing migration have expanded the location of women and girls who were forced into prostitution.: 'Today these women and girls can be found in Tel Aviv, Berlin, Amsterdam, Milan, New York City...As human trafficking and forced prostitution have moved into our midst, they have also moved on the political agenda of the Western industrialized world.' See Nora V. Demleitner, *The Law at a Crossroads: The Construction of Migrant Women into Prostitution*, in Global Human Smuggling, Comparative Perspectives edited by David Kyle and Rey Koslowski, 2001, 257-293, pp. 257.

²⁶According to Aiko Joshi, women are generally the ones affected the most in the transition economies. Aiko Joshi *The face of Human Trafficking*. Hastings Women's Law Journal Vol.13: 1. 2002, 18-30, p 19-25.

²⁷ United Nations Department of International Economic and Social Affairs, Activities for the Advancement of Women: Equality, Development and Peace at 17, U.N. Doc. ST/EsA/147 (1985).

²⁸ United Nations Department of International Economic and Social Affairs, Activities for the Advancement of Women: Equality, Development and Peace at 17, U.N. Doc. ST/EsA/147 (1985).

The United Nations began to approach trafficking in women as a human rights violation in the early 1990's, which set up a new ongoing trend, in approaching trafficking.

In 1991, trafficking in persons and the exploitation of the prostitution of others were the major discussion points at the UN's Working Group on Contemporary Forms of Slavery.²⁹ This led to the creation of the Draft Program of Action for the Prevention of Traffic in Persons and of the Exploitation of the Prostitution of Others.³⁰ In December 1991, the General Assembly created the Voluntary Trust Fund on Contemporary Forms of Slavery³¹ through Resolution A/46/122. The fund was envisaged as helping victims of contemporary forms of slavery. In the following years, no major change occurred with respect to the adoption of the Draft Program of Action for the Prevention of Traffic in Persons and of the Exploitation of the Prostitution of Others. Although the states parties were obliged to submit their replies and comments regarding the Draft, they did not do so.³² Therefore, one can rightfully conclude that this good initiative was a failure from the beginning.

In 1993, the Vienna Conference on Human Rights marked a new era when in its Declaration reaffirmed that that women's rights are human rights and clearly linked this to the problem of trafficking in women:

'The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.

²⁹ United Nations Commission on Human Rights Topic A Contemporary Slavery pg. 3, found on: www.fhsmun.org/docs/UNCHR-A.doc, also see: Draft programme of action for the prevention of traffic in persons and the exploitation of the prostitution of others, Report of the Secretary-General, COMMISSION ON HUMAN RIGHTS Fiftieth session, E/CN.4/1994/71, 7 December 1993.

³⁰ Ibid.

³¹ Ibid. p 3.

³² 5. In paragraph 18 of the resolution, the Sub-Commission requested the Secretary-General to continue to seek the views of States concerning the draft programme of action for submission to the Commission at its fiftieth-session. On 25 October 1993, a note verbale was sent by the Secretary-General to all States inviting them, *inter alia*, to submit their views concerning the draft programme of action.

As at 1 December 1993, no replies had been received.' See United Nations Commission on Human Rights Topic: *A Contemporary Slavery*, pg. 3, found on: www.fhsmun.org/docs/UNCHR-A.doc, also see: Draft programme of action for the prevention of traffic in persons and the exploitation of the prostitution of others, Report of the Secretary-General, COMMISSION ON HUMAN RIGHTS Fiftieth session, E/CN.4/1994/71, 7 December 1993.

Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support.

The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women.’³³

The Vienna Declaration recognizes trafficking in women as gender-based violence rather than connecting it, to forced prostitution. Consequently, it avoids dilemmas about the consent by confirming the irrelevance of the consent-a positive move.³⁴

The Declaration on the Elimination of Violence against Women adopted by the General Assembly Resolution in 1993, takes the Vienna Declaration’s articulation of trafficking in women as gender-based violence further. It establishes connection between trafficking in women and forced prostitution, therefore pointing out that prostitution must be dealt with by governments.³⁵ The importance of the Declaration *vis-à-vis* trafficking in women can be found in its recognition of the high levels of violence endured by women victims of trafficking.³⁶

Progress in connecting trafficking in women to human rights was also made at the Beijing Fourth Conference on Women in 1995, with the adoption Platform for Action.³⁷ The Platform for Action 3/ states:

"The effective suppression of trafficking in women and girls for the sex trade is a matter of pressing international concern. Implementation of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others [General Assembly resolution 317 (IV), annex], as well as other relevant instruments, needs to be reviewed and strengthened. The use of women in

³³ Vienna Declaration and Programme of Action, WORLD CONFERENCE ON HUMAN RIGHTS, Vienna, 14-25 June 1993, A/CONF.157/23, 12 July 1993.

³⁴ Ibid.

³⁵ See Declaration on the Elimination of Violence against Women, GA Doc. No. A/RES/48/104, 23 Feb. 1994.

³⁶ Ibid.

³⁷ ADVANCEMENT OF WOMEN, Traffic in women and girls, Report of the Secretary-General, General Assembly, Fifty-first session A/51/309, 27 August 1996, pg. 3 para. 3

international prostitution and trafficking networks has become a major focus of international organized crime. The Special Rapporteur of the Commission on Human Rights on violence against women, who has explored these acts as an additional cause of the violation of the human rights and fundamental freedoms of women and girls, is invited to address, within her mandate and as a matter of urgency, the issue of international trafficking for the purposes of the sex trade, as well as the issues of forced prostitution, rape, sexual abuse and sex tourism. Women and girls who are victims of this international trade are at an increased risk of further violence, as well as unwanted pregnancy and sexually transmitted infection, including infection with HIV/AIDS."³⁸

Through its strategic objective D.3. '*Eliminate trafficking in women and assist victims of violence due to prostitution and trafficking*,' the Platform calls on Governments of countries of origin, transit and destination to:

- (a). Consider the ratification and enforcement of international conventions on trafficking in persons and on slavery;³⁹

Furthermore, it confirmed the importance of addressing the root factors that encourage trafficking, such as economic, social, cultural and legal factors, in order to prevent and combat trafficking successfully.⁴⁰ Thus, the Beijing Platform stresses the need for governments to recognize that human rights of women victims of trafficking are affected, to introduce a human rights dimension into the fight against trafficking, and to regard their obligations under the international law accordingly:

'Governments are also urged to strengthen human rights instruments in order to combat and eliminate trafficking;⁴¹

³⁸ ADVANCEMENT OF WOMEN, Traffic in women and girls, Report of the Secretary-General, General Assembly, Fifty-first session A/51/309, 27 August 1996, pg. 3 para. 3

³⁹ Ibid.

⁴⁰ Economic and Social Council, UN, Economic Commission for Europe, Regional Preparatory Meeting on the 2000 Review of Implementation of the Beijing Platform for Action, *Trafficking in Women and Girls*, Doc. No. E/ECE/RW.2/2000/3.

⁴¹ Economic and Social Council, UN, Economic Commission for Europe, Regional Preparatory Meeting on the 2000 Review of Implementation of the Beijing Platform for Action, *Trafficking in Women and Girls*, Doc. No. E/ECE/RW.2/2000/3.

In 1996, the governments of UN member states were invited to implement the Beijing Platform for Action by the Resolution on Traffic in Women and Girls adopted by the Commission of Human Rights in 1996.⁴²

The same year, the Draft Program of Action for the Prevention of Traffic in Persons and of the Exploitation of the Prostitution of Others was adopted by the United Nation's Commission on Human Rights.⁴³

Following the Beijing Platform for Action, the General Assembly during its twenty-third session developed a document, 'Women 2000: gender, development and peace in the twenty-first century' confirming the measures to be taken by governments following the Beijing Platform for Action. The document recognized that gender-based violence such as sexual slavery and exploitation, international trafficking in women and girls; forced prostitution and sexual harassment, sexual abuse are incompatible with the dignity and worth of the human person and, therefore, must be combated and eradicated.⁴⁴

III. Convention against Transnational Organized Crime and the its supplementing Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

After connecting trafficking with the human rights, the United Nation also recognized the importance of connecting trafficking to transnational organized crime. With this perspective, it confirmed the need for a multi-faced approach in the fight against trafficking in women. In 2001, the United Nations adopted the *Convention against Transnational Organized Crime* and the its supplementing *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.⁴⁵

⁴² Commission on Human Rights, *Resolution on traffic in Women and girls* (E/CN.4/1996/L.29), and April 19, 1996.

⁴³ *Traffic in women and girls* Commission on Human Rights Resolution 1996/24 found on: www.unhchr.ch/Huridocda/Huridoca.nsf/0/279f4715306f960c8025672a005267ef?Opendocument.

⁴⁴ *Report of the Ad Hoc Committee of the Whole of the Twenty-third Special Session of the General Assembly*, GA Official Records, Twenty-third special session, Supplement No. 3 (A/S-23/10/Rev.1).

⁴⁵ See United Nations Convention against Transnational Organized Crime: Issues and challenges, paper presented by Rob Boone in the 20nd World Conference on Modern Criminal Investigation, Organized Crime and Human Rights, Dec, 2001. Found on: www.crimeinstitute.ac.za/20ndconf/papers/boone.pdf.

In December 2000, 14 heads of state, over 100 ministers and delegates from 150 countries attended the signing conference in Palermo, Italy for the UN Convention against Transnational Organized Crime. At the three-day conference, there were 124 signatories-an all-time record for a new convention.⁴⁶

The Convention and its Protocol, were envisaged as the new instruments that will help the United Nations in dealing with the challenge of trafficking in women and also improve the overall fight against trafficking in women.⁴⁷ The Convention frames trafficking in a crime control perspective-emphasising to a lesser extent the human rights dimension of trafficking which could prove, in the future a deficiency. On the positive side, it should be underlined that the Protocol is an instrument that obliges States to criminalize trafficking and prosecute of traffickers. It also addresses the need for states to provide protection and assistance to the victims of trafficking. In so far the prevention of trafficking is concerned, the Protocol has some flaws, as will be seen later in this text.

The Protocol in its Preamble, affirms its dedication to full protection of the internationally recognized human rights of victims of trafficking, thus calling for the adoption of a comprehensive approach that protects the internationally recognized human rights of victims of trafficking.⁴⁸ Article 2 states that one of the Protocol's purposes is the protection and assistance to victims of trafficking with full respect for their human rights.⁴⁹ In other words, the Protocol intends to assist the victims of trafficking without further violating their human rights, but remains silent *vis-à-vis* human rights violations that occur in all of the stages of trafficking, including addressing the root factors that lead to trafficking. This deficiency compromises the thoroughness of the document as prevention⁵⁰ instrument as much as it is pro-active and prosecution instrument.

The Special Rapporteur on Violence against Women has emphasized the inextricable link between the prevention and eradication of trafficking and protection of the human rights of trafficked persons. According to her, the approach towards

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Preamble to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, found on:

www.uncjin.org/Documents/Conventions/dcatoc/final_documents.pdf, visited on 03.10.2004.

⁴⁹ Article 2, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, found on:

www.uncjin.org/Documents/Conventions/dcatoc/final_documents.pdf, visited on 03.10.2004.

⁵⁰ The Protocol has the Suppression of trafficking in persons as one of its prerogatives contained in its title, but in terms of prevention it has not offer much consideration for the root factors of trafficking.

trafficking in the Convention reflected ‘*a failure of the international human rights community to fulfil its commitment to protect the human rights of women.*’⁵¹ However, in the drafting process the Protocol came close to the introduction of the human rights *as such* through Italy’s Proposal at the Eleventh Session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime:

“Article 3bis

“Protection of Human Rights and Social Assistance”

“1. States Parties shall protect the human rights of trafficked persons, as defined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and ensure that they may be exercised without discrimination on any ground such as race, colour, sex, language, religion...”⁵²

Unfortunately, this proposal was not accepted. The subsequent acceptance of this proposal would have reaffirmed that the Protocol is not so much a legal instrument against organized crime, but that it is continuing the development of the human rights approach to trafficking on all levels. This is very unfortunate given the rapid development of the human rights perspective on trafficking from the 1990’s onwards, it is important to state that the Protocol as an instrument adopts the organized crime approach and also leaves some space for a human rights approach. Consequently, the Protocol is not a full blown human rights instrument; however, it does contain an obligation to protect the rights of the victims and to provide assistance to them.

In its Article 6 *Assistance to and protection of victims of trafficking in person* it directs States Parties to:

‘in appropriate cases and to the extent possible under its domestic law, each State party shall protect the privacy and identity of victims of trafficking in persons...each

⁵¹ Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1997/44. UN ESCOR, Commission on Human Rights, fifty-sixth session, E/CN.4/2000/68.

⁵² United Nations General Assembly, Ad Hoc Committee on Elaboration of a Convention against Transnational Organized Crime, Proposals and contributions, Eleventh Session, 2000, Doc. No. A/AC.254/5/Add.28.

State Part shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons.’⁵³

In the author’s opinion the usage of the words ‘*in appropriate cases,*’ ‘*to the extent possible,*’ ‘*shall consider*’ leaves too much to the discretion of the individual State Parties to the Protocol. Consequently, this lack of specific obligations, in a way, undermines the Protocol’s effectiveness as a law enforcement instrument.

The Protocol, generally adopts the victim-centred approach (an approach that is considered a human rights approach), through paying attention to the status of the victims and encouraging State Parties to ensure that in their legal systems they introduce measures that ‘*permit the victims of trafficking in persons to remain in its territory, temporary or permanently in appropriate cases.*’⁵⁴ Again, the Protocol does not specify which are the ‘*appropriate cases,*’ when the victims should remain on the territory of the respective country. This, generalization can be read as hampering the Protocol’s value in terms of prosecution since the successful prosecution of trafficking depends on the full cooperation of the witnesses, *i.e.* the trafficking victim.⁵⁵ At the ninth session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, most of the delegations expressed concerns that if it excluded the ‘*safety valve*’ of the phrase: ‘*in appropriate cases,*’ then the Protocol would become a blank check for illicit migration since State Parties would be obliged to adopt legislation permitting victims of trafficking to remain in the a respective countries.⁵⁶

The Protocol, in its best efforts to be more victim-orientated, stipulates in Article 8 (2) that any return of the trafficking person to its country of origin ‘*shall preferably be voluntary.*’⁵⁷ The *travaux preparatoires* clarifying Article 8 (2) state:

⁵³ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, found on:

www.uncjin.org/Documents/Conventions/dcatoc/final_documents.pdf, visited on 03.10.2004.

⁵⁴ Article 7, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, found on:

www.uncjin.org/Documents/Conventions/dcatoc/final_documents.pdf, visited on 03.10.2004.

⁵⁵ Anne Gallagher, Human Rights and the New UN Protocol on Trafficking and Migrant Smuggling: Preliminary Analyses, Human Rights Quarterly (Nov. 2001), Volume 23, No. 4.

⁵⁶ GA, Ad Hoc Committee on the Elaboration of a Convention against transnational Organized Crime, Revised draft Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, Eleventh Session, 1999, A/AC.254/4/Add.3/Rev.7.

⁵⁷ Article 8, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, found on:

www.uncjin.org/Documents/Conventions/dcatoc/final_documents.pdf, visited on 03.10.2004.

'73. The travaux préparatoires should indicate that the words "and shall preferably be voluntary" are understood not to place any obligations on the State Party returning the victims.'⁵⁸

In other words, the victims of trafficking should return voluntarily after being rescued and assisted. However, if they do not want to return voluntarily the States can return them against their will.

In determining who is a trafficking victim, the Protocol does not distinguish between persons who entered legally or illegally into the respective country.⁵⁹

Unlike the 1949 Convention that predominately focused on the protection of the victims, the Protocol concentrates also on the criminalization and apprehension on traffickers.⁶⁰ Article 14 of the Protocol seems to put the spotlight on the interest of the victims reinforcing the human rights approach, once again, when adopting a rather broad saving clause that would prevent reinforced border controls to clash with the principle of non-refoulement:

'Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.'⁶¹

A weakness of the Protocol is its lack of provisions establishing a monitoring mechanism to ensure the Contracting States fulfil their obligations. Whether the Working Group on the Protocol will construct a basis for the creation of a reporting mechanism is still unclear.

IV. Conclusion

⁵⁸ Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, Doc. No. A/55/383/Add.1.

⁵⁹ Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, Doc. No. A/55/383/Add.1.

⁶⁰ Article 10, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, found on:

www.uncjin.org/Documents/Conventions/dcatoc/final_documents.pdf, visited on 03.10.2004.

⁶¹ Article 14, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, found on:

www.uncjin.org/Documents/Conventions/dcatoc/final_documents.pdf, visited on 03.10.2004.

In sum, next in a long line of international instruments all designed to fight trafficking in women, the Protocol seems to have worked out the contentious issues that created so many problems for its predecessors. It also approaches the issue of trafficking in a comprehensive way, including all sorts of trafficking, but retaining the emphasis on women and girls. The Protocol has managed to clarify the application of the organized crime approach and has also implemented the human rights approach albeit in a limited way.